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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

PAUL C. HAMILTON,

Plaintiff and Appellant,

v.

J. A. YATES et al.,

Defendants and Respondents.

F058630

(Super. Ct. No. 08CECG02352)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Alan M. Simpson, Judge.

Paul C. Hamilton, in pro. per., for Plaintiff and Appellant.

Edmund G. Brown, Jr., Attorney General, Rochelle C. East, Assistant Attorney General, Kenneth R. Williams and Jessica R. Devencenzi, Deputy Attorneys General, for Defendant and Respondent.

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Paul C. Hamilton, an inmate at Pleasant Valley State Prison, filed a complaint for damages in propria persona against the warden and three other officials. Hamilton alleged the defendants subjected him to inhumane conditions, implemented a lockdown

that discriminated against inmates based on their race or ethnicity, and took reprisals against him for filing a grievance.

Defendants filed a demurrer and the trial court sustained it without leave to amend. The trial court concluded, among other things, that the inmate was judicially estopped from asserting that his complaint stated claims under title 42 United States Code section 1983 (section 1983) for violations of his civil rights. The trial court based its conclusion on the positions taken by Hamilton in federal district court when he successfully opposed the removal of the lawsuit to federal court.

This appeal concerns the application of the doctrine of judicial estoppel in the procedural context of a demurrer. Initially, we conclude that judicial estoppel is among the special defenses that California law allows to be raised in a general demurrer. In the record presented, however, defendants failed to establish all of the necessary elements of judicial estoppel. First, the papers Hamilton filed in federal court do not state explicitly that he is not pursuing federal claims. Second, those papers are ambiguous as to whether Hamilton intended to pursue federal claims in this lawsuit and, under applicable California law, that the ambiguity cannot be construed against him at the pleading stage of this lawsuit. Thus, judicial estoppel cannot be applied to bar Hamilton from pursuing federal claims made under section 1983.

The judgment of dismissal will be reversed.

FACTS

Hamilton was born in Nassau, Bahamas and describes himself as an African-Bahamian with black skin who is classified as an “other” or “documented other,” not an African-American. The defendants are Warden Yates at Pleasant Valley State Prison, Chief Deputy Warden Mattingly, Associate Warden Trimble, and Associate Warden Spearman.

The summary of the allegations of Hamilton’s complaint set forth in the following four paragraphs has been taken from defendants’ memorandum of points and authorities

in support of their demurrer to Hamilton's complaint. We have reviewed Hamilton's complaint and the summary provided by the defendants is accurate.

Hamilton alleges that on May 31, 2007, a riot occurred between Hispanics and Blacks. Because of this riot, Deputy Warden Mattingly issued a lockdown order. While all Black inmates, including those who were not involved in the riot, were ordered locked down, only a portion of the Hispanic inmates, the South Siders, were locked down.

Hamilton was on lockdown for over five and a half weeks and was deprived of outdoor exercise during that time. As a result, he suffers serious back pains.

Hamilton also claims that for weeks prior to June 30, 2007, he noticed consistently strong odors of feces and urine and requested to be moved, but the request was denied.

Hamilton filed administrative appeals, complaining about discrimination, deprivation of outdoor exercise, and the strong odors in his cell. He also allegedly notified Warden Yates, who never responded to his complaints. The three other defendants either denied, or only partially granted, the administrative complaints and appeals. Hamilton claims reprisals have been taken against him for filing an administrative grievance. He requests only money damages as relief.

PROCEEDINGS

In July 2008, Hamilton started this lawsuit by filing a complaint in Fresno Superior Court. After unsuccessful attempts to serve the summons and complaint on the defendants, it appears that Hamilton filed an adequate proof of service in March 2009.

Defendants removed the lawsuit to the United States District Court for the Eastern District of California by filing a notice of removal of action under 28 United States Code section 1441(b) (federal question) and a request for screening pursuant to 28 United States Code section 1915A(a).

In April 2009, Hamilton filed an opposition to removal and lodged the exhibits to his complaint, which defendants had not included in the removal documents. Hamilton stated that (1) he opposed removal, (2) for his safety in appropriately making out his case

for screening purposes, he was submitting the exhibits to the complaint that were missing in defendants' request for removal, and (3) he already had been approved to proceed in forma pauperis in state court so it was not his duty to provide docket and filing fees.

Hamilton's opposition also stated:

"No objection is being made with regards to defendants' request for screening of the complaint, as long as the court bears in mind that the initial filing of this complaint was intended for state court. Wherein, if there are any defects noted by this federal court, it will be plaintiff's request, that he be allowed to cure such defects by way of amending the complaint, to show both objective and subjective requirements with regards to the civil violations being raised. That is, with this court bearing in mind that it was defendants' request to have this matter removed from state court under the objection by plaintiff."

Even though defendants' notice of removal stated that the request was based on federal question jurisdiction, Hamilton did not explicitly argue that his complaint did not raise a federal question or that he was not claiming a violation of federal law.

In April 2009, the magistrate judge for the federal district court issued findings and recommendations. On May 26, 2009, the federal district court filed an order adopting in full the findings and recommendations issued by the magistrate judge on April 14, 2009, and remanding the action to the Fresno Superior Court.

Thirty days later, on June 25, 2009, defendants filed a demurrer that asserted all causes of action failed to state facts sufficient to constitute a cause of action against them. The demurrer also asserted that Hamilton's claim for reprisals was fatally uncertain and that Hamilton failed to comply with the California Tort Claims Act (Gov. Code, § 810 et seq.).

Defendants' memorandum of points and authorities in support of their demurrer asserted that Hamilton "objected to the removal, because he was not claiming violations of the United States Constitution. [Citation.] Based on [Hamilton's] representations, the

district court remanded this matter to the state court.”¹ Defendants’ memorandum of points and authorities did not (1) mention or provide an analysis of the elements of judicial estoppel or (2) assert that the factual allegations contained in Hamilton’s complaint and exhibits were insufficient to state a violation of federal law.

Hamilton’s opposition to the demurrer asserted, among other things, that “the complaint stating the claims as it does, sufficiently states facts as required to state a claim under state and federal constitutional law.”

Prior to the hearing on the demurrer, the court issued a tentative ruling indicating that the demurrer would be sustained and a request for defaults filed by Hamilton lacked an appropriate basis. On August 11, 2009, the trial court held a hearing and Hamilton appeared by telephone. After the hearing, the court entered a minute order stating that the demurrer was sustained without leave to amend. Subsequently, the court filed a judgment dismissing Hamilton’s complaint with prejudice.

Hamilton appealed.

DISCUSSION

I. Hamilton’s Federal Claims and Judicial Estoppel

A. Trial Court’s Ruling and the Parties’ Contentions

The trial court addressed whether Hamilton had stated a cause of action under the federal Civil Rights Act—specifically, section 1983. That statute authorizes a claim for damages against any person who, acting under color of state law, deprives a plaintiff of any rights secured by the United States Constitution. The trial court considered (1) defendants’ attempt to remove the lawsuit to federal district court, (2) Hamilton’s opposition to removal, and (3) the district court’s order denying removal and remanding the case to state court. The trial court analyzed whether the positions taken by Hamilton

¹Defendants supported their demurrer by filing a request for judicial notice that included documents from the removal proceeding conducted by the federal district court.

in opposing removal satisfied the elements of the doctrine of judicial estoppel. The court determined those elements were clearly met and thus concluded Hamilton was “judicially estopped from now arguing that he is asserting *federal* claims.”

Hamilton contends the trial court misconstrued the papers he submitted to the federal district court. He urges this court to review those papers because nowhere can it be seen that he told the federal district court that he was not claiming violations of the United States Constitution.

Defendants argue the trial court appropriately applied the doctrine of judicial estoppel to bar Hamilton from claiming violations of the United States Constitution “because he disclaimed any federal causes of action to prevent removal to federal court.”

B. The Doctrine of Judicial Estoppel

Judicial estoppel is an equitable doctrine that prevents a party from gaining an advantage in a legal proceeding by asserting one position, and then seeking a second advantage by taking an incompatible position. (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422.)² The gravamen of judicial estoppel is the *intentional* assertion of an inconsistent position that perverts the working of the judicial process. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.) The goals of the doctrine are to (1) maintain the integrity of the judicial system and (2) protect parties from an opponent’s unfair strategies. (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc., supra*, at p. 422.) In less formal terms, the doctrine protects against a litigant playing “fast and loose” with the courts. (*Jackson, supra*, at p. 181.) The doctrine most appropriately applies when:

““(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent;

²This is the most recent civil case in which the California Supreme Court has addressed judicial estoppel.

and (5) the first position was not taken as a result of ignorance, fraud, or mistake.””” (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.*, *supra*, 36 Cal.4th at p. 422.)

Because of the doctrine’s equitable nature, “its application, even where all necessary elements are presented, is discretionary.” (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.*, *supra*, 36 Cal.4th at p. 422.)

C. Raising Judicial Estoppel in a Demurrer

First, we address a threshold procedural issue: Does California law allow the equitable doctrine of judicial estoppel to be raised in a general demurrer?

Initially, we note that Code of Civil Procedure section 430.10 does not list judicial estoppel as one of the grounds that a demurrer may raise. Also, one commentator has stated that, generally, “[b]ecause the demurrer tests the pleading alone, and not the evidence or other extrinsic matters, it lies only where the defects appear on the face of the pleading.” (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 947, p. 360.) This general rule produces the corollary that the “defendant cannot strengthen the demurrer by bringing in evidentiary material that discloses a defect in the complaint.” (*Ibid.*) Thus, Code of Civil Procedure section 430.10 and the foregoing general rule would seem to preclude a demurrer that asserts judicial estoppel with the support of matters outside the complaint.

The general rule, however, is subject to exceptions. One of those exceptions allows a demurrer to assert a ground that appears “from any matter of which the court is required to or may take judicial notice.” (Code Civ. Proc., § 430.30, subd. (a).) Furthermore, the basis for the so-called “general” demurrer—that the “pleading does not state facts sufficient to constitute a cause of action” (*id.*, § 430.10, subd. (e))—has been interpreted by the courts to allow defendants to raise certain special defenses such as the statute of limitations, laches, res judicata, and privileges in tort actions. (See 5 Witkin, Cal. Procedure, *supra*, Pleading, §§ 961-967, pp. 374-380.)

Because of the similarities between res judicata (sometimes called claim preclusion)³ and judicial estoppel (sometimes referred to as the doctrine of preclusion of inconsistent positions),⁴ we conclude that a defendant is permitted procedurally to raise judicial estoppel in a general demurrer. It is, however, another question whether a defendant has established the elements of the doctrine of judicial estoppel at that stage of the proceedings.

Our conclusion that the bar created by the doctrine of judicial estoppel is permitted to be raised in a general demurrer does not contradict the statement of the court in *Cloud v. Northrup Grumman Corp.* (1998) 67 Cal.App.4th 995 that “a defense of judicial estoppel raises factual issues. [Citation.] These factual issues could not be decided solely by reviewing plaintiff’s complaint and matters that could be judicially noticed, and hence could not be decided on a motion for judgment on the pleadings.”⁵ (*Cloud*, at p. 1000.) The court’s determination that the issue of judicial estoppel could not be decided at the pleading stage was specific to the facts of that case—it was not the pronouncement of a rule of law that judicial estoppel can never be decided in favor of a defendant at the pleading stage of a lawsuit.

In summary, we recognize that, ordinarily, “whether judicial estoppel should be applied is a factual question.” (*Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal.App.4th 497, 510.) Nevertheless, in situations where the relevant facts are undisputed, the existence of the elements of judicial estoppel presents a question of law that can be

³*Louie v. BFS Retail & Commercial Operations, LLC* (2009) 178 Cal.App.4th 1544, 1548, footnote 2.

⁴*Jackson v. County of Los Angeles*, *supra*, 60 Cal.App.4th at page 181, quoting Comment, *The Judiciary Says, You Can’t Have It Both Ways: Judicial Estoppel—A Doctrine Precluding Inconsistent Positions* (1996) 30 Loyola L.A. L.Rev. 323, 327.

⁵A general demurrer is reviewed under the same rules that apply to a motion for judgment on the pleadings. (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1401.)

decided on demurrer. (See *The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 843 [order sustaining demurrer reversed; circumstances did not warrant judicial estoppel].)

D. Elements of Judicial Estoppel

1. Contentions and issues

Hamilton contends that it is abundantly clear that he did not disclaim any federal causes of action in the papers he filed objecting to the removal and, as a result, the doctrine of judicial estoppel cannot apply to bar his making federal claims before the state court.

Defendants contend that “the doctrine of judicial estoppel bars Hamilton from making federal claims in this state action because he disclaimed any federal causes of action to prevent removal to federal court.”

These contentions by the parties reflect their disagreement over the position that Hamilton took before the federal district court in opposing the removal. Because defendants did not file any transcripts of hearings held in federal court, Hamilton’s position is defined by the written documents he filed in federal district court. Those documents are his (1) opposition to removal and lodgment of missing exhibits, which was filed on April 10, 2009, and (2) reply to defendants’ objections to the United States magistrate’s findings and recommendations for remand, which was filed on May 21, 2009.

2. Rules for determining what a document means

The parties’ dispute over what Hamilton meant in the papers he filed in federal district court can be stated in terms of the elements of judicial estoppel. They dispute what “position” he took and whether that position is “completely inconsistent” with his attempt to pursue section 1983 claims in this lawsuit.

Before we address what position Hamilton took before the federal district court, we must identify the rules of law that will govern our interpretation of Hamilton’s two

filings in federal court. The parties have cited no cases that discuss how a reviewing court should determine exactly what position a party took in its written documents when, in the procedural context of a demurrer, a dispute over the meaning of those documents exists.

The documents containing Hamilton’s objections to removal were included in defendants’ request for judicial notice in support of their demurrer. Because these documents were presented through judicial notice and not as exhibits to the complaint, we will examine the rules of law that address how courts discern the meaning of documents subject to judicial notice as well as the rules of law concerning how documents are interpreted at the pleading stage of a lawsuit.

Witkin makes the following observation regarding judicial notice in the procedural context of a demurrer:

“Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning. [Citations.] ‘The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable.’ [Citation.]” (5 Witkin, Cal. Procedure, *supra*, Pleading, § 948, p. 363.)

In *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, the court acknowledged that “[v]arious tests or rules have been suggested to determine whether a court which has taken judicial notice of a document may take the further step of accepting its truth or *adopting a proposed interpretation of its meaning.*” (*Id.* at p. 374, italics added.) The court proceeded to identify three approaches, which were designed primarily to address the truthfulness of a statement in a document subject to judicial notice. (*Id.* at pp. 374-375.) For example, the court stated:

“A third approach, which provides maximum flexibility while still insisting disputed factual issues cannot be resolved on demurrer, proposes ‘judicial notice of matters upon demurrer will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed.’ [Citation.]” (*Id.* at p. 375.)

The court in *Joslin* focused on the issue of truthfulness and did not discuss the issue of how to interpret the document (a deposition transcript) subject to judicial notice. A more recent decision has addressed the interpretation issue. In *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, a case where the document in question was a contract, the court stated:

“The proper interpretation of a contract is disputable if the contract is susceptible of more than one reasonable interpretation, that is, if the contract is ambiguous. An ambiguity may appear on the face of a contract, or extrinsic evidence may reveal a latent ambiguity. [Citation.] A court determining whether a contract is ambiguous must first consider extrinsic evidence offered to prove the parties’ mutual intention. If the court determines that the contract is reasonably susceptible of an interpretation supported by extrinsic evidence, the court must admit that evidence for purposes of interpreting the contract. [Citation.] A court cannot determine based on only the four corners of a document, without provisionally considering any extrinsic evidence offered by the parties, that the meaning of the document is clear and unambiguous. [Citation.] Instead, a court must provisionally consider extrinsic evidence offered by the parties in the manner we have stated.

“For a court to take judicial notice of the meaning of a document submitted by a demurring party based on the document alone, without allowing the parties an opportunity to present extrinsic evidence of the meaning of the document, would be improper. A court ruling on a demurrer therefore cannot take judicial notice of the proper interpretation of a document submitted in support of the demurrer. [Citations.] In short, a court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show.” (*Id.* at pp. 114-115, fn. omitted.)

We conclude similar rules apply to the interpretation of the documents Hamilton filed with the federal district court. Specifically, our first step is to determine if the documents are ambiguous on their face. If the documents are ambiguous on their face—that is, reasonably susceptible to more than one interpretation (*Winet v. Price* (1992) 4

Cal.App.4th 1159, 1165)—regarding the position Hamilton took before the federal district court, that ambiguity cannot be resolved against Hamilton on demurrer.⁶

3. *Hamilton's statements are ambiguous*

Defendants' reply brief cites pages 73 through 77 of the clerk's transcript to support their view that "Hamilton represented to the federal court that he was bringing only state claims" These pages in the record include Hamilton's reply to defendants' objections to the United States magistrate's findings and recommendations for remand, the related proof of service, and the order of the United States District Court adopting the findings and recommendations and remanding the matter to state court.

The first point Hamilton made in his reply was that a state court "may not decline, for all that matters, to entertain a section 1983 action in the absence of a 'valid excuse.' *Howlett v. Rose* 496 U.S. 356, 369-70 (1990)."⁷ The next paragraph of Hamilton's reply discusses what constitutes a valid excuse. Then Hamilton stated:

"This being said, it matter [*sic*] not how plaintiff presented his claim at exhaustion [*sic*] stages. Plaintiff being the master of his complaint, took the state court tort avenue in bringing his claims to a court. This is the forum plaintiff chosed [*sic*], and for all that matters, the state court being aware of the claims has not declined to entertain them. Its [*sic*] defendants who, with reasons unknown, sought such removal. It should REMAIN DENIED." (CT 73:12-18)!

Interpreting this statement and the other statements in Hamilton's reply leads us to note initially that Hamilton did not state directly that he is forgoing or abandoning (1) any

⁶This approach is compatible with how reviewing courts treat ambiguous exhibits to the complaint. When reviewing the ruling on a demurrer, "if the exhibits are ambiguous and can be construed in the manner suggested by plaintiff, then we must accept the construction offered by plaintiff. [Citations.]" (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83.)

⁷This court has recognized that state courts have jurisdiction (which is concurrent with the jurisdiction of federal courts) to hear claims brought under section 1983. (*Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.* (2003) 113 Cal.App.4th 597, 604.)

claim based on federal law, (2) any claim brought under section 1983, or (3) any claim for violation of his rights and privileges under the United States Constitution. The absence of a direct (explicit) statement leads us to the following question: Did Hamilton's reply unambiguously imply that he had disclaimed all causes of action under section 1983?

The statement most susceptible to this inference is the following: "Plaintiff being the master of his complaint, took the state court tort avenue in bringing his claims to a court. This is the forum plaintiff chosed" The phrase "state court tort avenue" could be interpreted to mean tort causes of action based solely on state law. Under this interpretation, Hamilton's statement would mean that he chose to pursue only those tort claims based on state law.

The two-sentence statement, however, is reasonably susceptible to other interpretations. For example, Hamilton might have been referring to the court or forum and not the type of claim he was asserting. Under this interpretation, Hamilton's statement would mean that he chose state court for all of his claims (whether based on federal or state law) and his choice should prevail over defendants' choice. Hamilton's reference to "state court tort avenue" is followed by the statement: "This is the *forum* plaintiff chosed" (Italics added.) He did not state, "These are the *claims* plaintiff chose," which would have provided stronger support for the inference that he wished to pursue only claims based on state law.

In summary, Hamilton's statement about the "state court tort avenue" is ambiguous. He might have been addressing his choice of court or forum, rather than the type of claims he had chosen to pursue. If he was addressing his choice of court, he might have done so based on the mistaken belief that a plaintiff's choice takes precedent over the wishes of the defendants. Stated otherwise, he might have been ignorant of a defendant's right to remove a complaint to federal district court when that matter presents

a federal question, even if the state court chosen by the plaintiff has concurrent jurisdiction.

This interpretation of Hamilton's statement about the "state court tort avenue" is consistent with inferences drawn from other parts of his reply. (See *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 829 [bylaws "read as a whole" by the court].) If Hamilton intended to forgo any federal claims and assert only state law claims, there would have been no point for him to start his reply by stating that state courts may not decline to entertain a section 1983 action without a valid excuse and then note that "the state court being aware of the claims has not declined to entertain them." His reference to section 1983 actions in state court would have made little sense if he did not believe he was asserting a section 1983 claim. The possibility Hamilton held this belief is consistent with the way defendants interpreted his complaint in their request to remove the action to federal court: "Plaintiff has pled: (1) racial discrimination in violation of the Equal Protection Clause, (2) inhumane prison conditions in violation of the Eighth Amendment, and (3) retaliation in violation of the First Amendment"

In summary, we conclude that the papers Hamilton filed in federal district court are ambiguous on their face. The ambiguity cannot be resolved against Hamilton at the pleading stage of this lawsuit. Accordingly, it cannot be determined what position Hamilton took before the federal court and whether that position is totally inconsistent with his argument that his complaint states a cause of action under section 1983. Therefore, the demurrer cannot be upheld on the ground that judicial estoppel bars his assertion of federal claims.

4. Ignorance or mistake

The fifth element of the doctrine of judicial estoppel requires the defendants to establish that Hamilton's position in federal district court "“was not taken as a result of ignorance, fraud, or mistake.”” (MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc., *supra*, 36 Cal.4th at p. 422.) Because of our determination

regarding the ambiguity of Hamilton's position, we need not address whether defendants established this element. (See *Kelsey v. Waste Management of Alameda County* (1999) 76 Cal.App.4th 590, 598 [order granting summary judgment reversed because there was a question of fact regarding plaintiff's ignorance].)

E. Consequences of Failure to Establish Judicial Estoppel

Defendants have failed to establish that Hamilton's federal claims are barred by the doctrine of judicial estoppel. Furthermore, the demurrer and supporting papers defendants filed in the trial court and the appellate brief they filed in this court does not argue that the factual allegations contained in Hamilton's complaint and exhibits are insufficient to state a section 1983 claim. Because defendants have not presented any further argument for their position that Hamilton could not pursue any federal claims in this lawsuit, we will not discuss the topic of federal claims further.

II. Damages Are Not Recoverable for Violation of State Constitution

The trial court concluded that Hamilton had failed to state a cognizable cause of action *for damages* based on violations of the state Constitution because California law does not permit damages as a remedy for such violations.

We agree with the trial court's conclusion. Hamilton did not state a cause of action for the recovery of money damages based on the theory that defendants' acts or omissions violated a provision of the California Constitution.

A. Cruel or Unusual Punishment

Does California recognize a claim for money damages based on an alleged violation of the provision in the California Constitution that prohibits cruel or unusual punishment? This issue has been addressed and answered in the negative. (*Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 254.) We concur in the conclusion that money damages are not a remedy available for violating the California Constitution's prohibition against cruel or unusual punishment.

B. Equal Protection

In *Gates v. Superior Court* (1995) 32 Cal.App.4th 481, the court determined that the equal protection provisions of the California Constitution did not give rise to a right to sue for damages. (*Id.* at p. 518.) We concur in the conclusion that damages are not among the remedies available to a person who has suffered a violation of the right to equal protection set forth in the California Constitution.

C. Retaliation

California Constitution, article I, section 3, subdivision (a) states that the people have the right to “petition government for redress of grievances” Hamilton’s retaliation claim can be interpreted as alleging a violation of this constitutional provision. If Hamilton’s complaint is interpreted in this manner, we conclude he has not stated a valid cause of action because money damages are not a remedy for a violation of the constitutional right to present grievances. (See *MHC Financing Ltd. Partnership Two v. City of Santee* (2010) 182 Cal.App.4th 1169, 1188 [court concluded money damages were not an appropriate remedy for violation of the right to petition set forth in Cal. Const., art. I., § 3, subd. (a)].)

In addition, Hamilton’s retaliation claim could be interpreted as alleging a violation of California Constitution, article I, section 2, subdivision (a), which provides that every person may speak and write freely. In *Degrassi v. Cook* (2002) 29 Cal.4th 333, the California Supreme Court (1) concluded that this constitutional provision, in itself, did not provide for an express or implied right to seek damages for a violation of the free speech right it set forth and (2) declined to recognize a constitutional tort action for damages to remedy the asserted violation of plaintiff’s right to free speech. (*Id.* at p. 342.) Thus, if Hamilton’s retaliation claim is interpreted as alleging a violation of the right to free speech protected by the California Constitution, we conclude that damages are not available as a remedy and he has not stated a cognizable cause of action.

III. Default for Failure to Answer the Complaint within 30 Days

Hamilton contends defendants failed to answer his complaint within 30 days and, therefore, he was entitled to an entry of default pursuant to Code of Civil Procedure section 585. That statute provides that the clerk of court shall enter a default if the defendant has been served and fails to file one of the listed responses within the time stated in the summons.⁸

Hamilton argues that the default provision in Code of Civil Procedure section 585 has nothing at all to do with the federal removal procedures and, therefore, defendants could not rely on that procedure to avoid filing a timely answer. It is true that a notice of removal to federal court is not one of the responses listed in subdivision (b) of Code of Civil Procedure section 585. Hamilton's argument about the legal effect of the omission of a notice of removal from the listed responses, however, is mistaken because it ignores another statute on point. The California Legislature did not include notices of removal in Code of Civil Procedure section 585 because another statute addresses the effect of an unsuccessful attempt to remove an action to federal court on the amount of time a defendant has to file an answer or demurrer. Specifically, Code of Civil Procedure section 430.90, subdivision (a)(2) states that a defendant has 30 days to respond from the day the original court receives the case on remand from the federal court. This provision effectively creates an exception to the statement in Code of Civil Procedure section 585 that a defendant must file a response within the time stated in the summons.

⁸Subdivision (b) of Code of Civil Procedure section 585 provides in pertinent part: "In other actions, if the defendant has been served, other than by publication, and no answer, demurrer, notice of motion to strike of the character specified in subdivision (f), notice of motion to transfer pursuant to Section 396b, notice of motion to dismiss pursuant to Article 2 (commencing with Section 583.210) of Chapter 1.5 of Title 8, notice of motion to quash service of summons or to stay or dismiss the action pursuant to Section 418.10 or notice of the filing of a petition for writ of mandate as provided in Section 418.10 has been filed with the clerk of the court within the time specified in the summons, or within further time as may be allowed, the clerk, upon written application of the plaintiff, shall enter the default of the defendant."

In this case, the trial court correctly applied Code of Civil Procedure section 430.90, subdivision (a)(2) to the facts presented. On May 26, 2009, the federal district court filed its order remanding the matter to the Fresno Superior Court. Exactly 30 days later, on Thursday, June 25, 2009, defendants filed their demurrer. It follows that defendants' demurrer was timely and, therefore, Hamilton's request for a default could not be granted.

Accordingly, the denial of Hamilton's request for entry of a default will be upheld.

DISPOSITION

The judgment of dismissal is reversed and the trial court is directed to vacate its order sustaining the demurrer.

DAWSON, J.

WE CONCUR:

CORNELL, Acting P.J.

POOCHIGIAN, J.